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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ASTORIA FEDERAL SAVINGS & LOAN ASSOCIATION,
Petitioner,

vs.

THE STATE OF NEW YORK and NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE (JAMES J. WEXLER, COMMISSIONER OF TAXATION AND FINANCE) and THE CITY OF NEW YORK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, SECOND DEPARTMENT

REPLY TO BRIEFS IN OPPOSITION

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This is in reply to the Brief of Respondents, State of New York and the New York State Department of Taxation and Finance (collectively referred to herein as "State"), dated June 3, 1997 and received by mail by the petitioner on June 5, 1997 and the Brief of Respondent, City of New York ("City") dated and received by petitioner on May 30, 1997, in opposition to petitioner's Petition for a Writ of Certiorari.

Under the law of the State of New York, bonds issued by public authorities are contracts. In *Patterson v. Carey,* 41 N.Y.2d 714, 395 N.Y.S.2d 411, 363 N.E.3d 1146 (1977), the State's highest court held that a bond issued by a public

authority, as in this case, was a contract and the amendment of the statute authorizing such bonds was the impairment of contract under the Constitution of the United States.

As stated by the State in its Brief, in deciding a federal question as to whether a contract exists, this Court must accord respectful consideration and great weight to the views of the State's highest court. (State's Brief in Opposition, page 11). However, despite the fact that the bonds involved herein are contracts, neither of the State courts below regarded them as such but merely viewed their provisions as statutes to be construed by parol evidence. They did not apply the principles of contract law in reviewing the terms of the contract.

The State court below acknowledged the clarity of the statute at issue herein, stating, "In addition, by its plain language it exempts bonds and interest on the bonds from 'franchise taxes', when, as noted above, only *corporations* are subject to franchise taxes." (Petition for a Writ of Certiorari, page A-9) On the other hand, the City states, "The Court agreed with defendants that the statute was anything but plain, citing several examples of the statute's patent ambiguities, i.e., it appeared to exempt bondholders from the imposition of real estate taxes on the bonds or their interest and to exempt the bonds and their interest from franchise taxes - two clear impossibilities." City Brief in Opposition, pages 5 and 6. Not only is that statement incorrect and contrary to the statement of the State court mentioned above, but the City never furnished any reason as to why it was impossible for the covenant to exempt the bonds and interest thereon from franchise tax. Obviously the covenant was clear and unambiguous and there is no reason why the bonds and interest could not be so exempt.

The reference to the "inartful draftsmanship" of the legislation in the decisions of the State courts does not apply to the covenant made to bondholders that the bonds and interest thereon are exempt from franchise tax (State Brief in Opposition, page 8, City Brief in Opposition, page 2). The lower State court held, "The relevant legislation . . . is unclear and

ambiguous as a result of inartful draftsmanship. The statutory language exempt the 'Bonds' and the income therefrom, and the property and activities of the 'Authority' from all taxes, and then lists without limitation, various types of taxes." (Petition for a Writ of Certiorari, page A-26) The "inartful draftsmanship" was to the fact that an exemption for both the "Bonds" and "Authority" were combined in a sentence prior to the covenant. However the covenant contained in the next sentence of the statute was made solely to bondholders and specifically stated that the "Bonds" were exempt from franchise tax. It had no application to the "Authority", as in the prior sentence.

Despite the clarity of the covenant, the State courts eschewed the "plain meaning" principle of statutory construction, which is the primary rule. *Howitt v. Street & Smith Publications, Inc.*, 276 N.Y. 345, 12 N.E.2d 435 (1938) Instead the courts applied such principles as, ". . . the taxpayer claiming an exemption bears the heavy burden of establishing that clear and unambiguous statutory language creates such an entitlement . . ." (Petition for a Writ of Certiorari, page A-8), "However, it is incumbent upon the courts 'to avoid interpreting a statute in a way that would render it unconstitutional if such a construction can be avoided and to uphold the legislation if any uncertainty about its validity exists.'" (Id, page A-11) and "Finally, yet another rule of statutory construction requires that the plaintiff's arguments be rejected. That is where recourse is had to the Tax Commission for his interpretation of a rule involving taxation, the courts should defer to his interpretive expertise, unless his reading of the statute is clearly unreasonable, irrational or palpably contrary to the Legislature's intention." (Id., page A-12) Rather than interpreting the contract by its clear and ambiguous terms the State courts relied on parol evidence developed after the bonds had been issued.

The State and City in their Briefs in Opposition are asking this Court to let stand a decision of the State court which, in effect, provides that the legislature did not intend that which the clear language of the statute states. Statutory contracts

must be construed by the language thereof and not by the supposed intention of one of the contracting parties which was not expressed, otherwise there never could be any legally enforceable contract.

The issue involved herein is an extremely important federal question, to wit: Can a State in the guise of statutory construction impair the obligations of a contract? If this is so the Contract Clause of the Constitution of the United States is nugatory with respect to statutory contracts. A state legislature could always retroactively repeal statutes containing such contracts by "clarifying amendments" and defend them on the basis of their application of the rules of statutory construction.

The petitioner respectfully prays that its Petition for a Writ of Certiorari be granted.

Respectfully Submitted,

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